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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

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In re: Request for Regulatory Determination filed by Blackwell Land Company, Inc., concerning the State Water Resources Control Board's Resolution No. 88-63, "Sources of Drinking Water," adopted May 19, 1988 [1]	1989 OAL Determination No. 8 [Docket No. 88-010] May 17, 1989 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether the State Water Resources Control Board's policy on designation of surface and ground waters of the state as sources of drinking water is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that Resolution 88-63, the Board's "Sources of Drinking Water" policy, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act because the resolution implements, interprets, and makes specific statutory law that governs water quality.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether State Water Resources Control Board's Resolution No. 83-63, "Adoption of Policy Entitled 'Sources of Drinking Water,'" adopted on May 19, 1988, is (1) a "regulation" as defined in Government Code section 11342, subdivision (b), (2) required to be adopted pursuant to the Administrative Procedure Act ("APA"), and (3) therefore violates Government Code section 11347.5, subdivision (a).[4]

THE DECISION [5,6,7,8]

The provisions of Resolution No. 88-63, except for the "Whereas" provisions, (1) are "regulations" as defined in Government Code section 11342, subdivision (b); (2) are subject to the requirements of the APA (see footnote 9);[9] have not been adopted pursuant to the requirements of the APA; and (3) therefore, violate Government Code section 11347.5, subdivision (a).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The State Water Resources Control Board (the "State Board") and the California Regional Water Quality Control Boards (the "Regional Boards") are "the principal state agencies with primary responsibility for the coordination and control of water quality. . . ."[10] The State Board sets policy for and coordinates the statewide program for water quality control for all the waters of the state.[11,12] A Regional Board administers the statewide program for water quality control within each of the State's nine designated geographical regions.[13,14] The State Board and the Regional Boards are in the Resources Agency,[15] a part of the executive branch of State government.

Authority [16]

The State Board and the Regional Boards have quasi-legislative powers to adopt, amend and repeal administrative regulations concerning water quality control. The State Board and a Regional Board's rulemaking authority and implied exemptions from the APA were recently discussed in an OAL Determination, which found that the Boards' policies on "wetlands" were "regulations" required to be adopted in compliance with the APA.[17] With regard to the rulemaking authority of the State Board,[18] Water Code section 1058 provides:

> "The board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under [the Water Code]."

The State Board exercises "the adjudicatory and the regulatory functions of the state in the field of water resources."[19] Water Code section 13001 provides in part:

> "It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality. . . ." [Emphasis added.]

These sections expressly delegate to the State Board the power to adopt quasi-legislative administrative regulations to govern water quality control in California. Moreover, the State Board has implied quasi-legislative power to adopt regulations necessary to exercise powers expressly granted to it.[20]

Applicability of the APA to Agency's Quasi-Legislative Enactments

Several provisions of law evidence the applicability of the APA to "regulations" adopted by the State Board.

Government Code section 11346 provides that "[i]t is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. . . ." The section goes on to say:

> "the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. . . ." [Emphasis added.]

Another section, Government Code section 11343, subdivision (a) provides that "[e]very state agency shall:

> "(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it . . . ."[21] [Emphasis added.]

The State Board is a "state agency" for purposes of the APA. Government Code section 11342, subdivision (b) clearly indicates that the term "state agency" applies to all state agencies, except those "in the judicial or legislative departments."[22]

The State Board is authorized by Water Code section 1058 (quoted above under "Authority") to adopt regulations on water quality control. The State Board's rulemaking authority under section 1058 was expanded in 1969 to include regulations on water quality control under the Porter-Cologne Water Quality Control Act, Division 7 of the Water Code, sections 13000 through 13999.16 (the "Porter-Cologne Act").[23]

Reading Government Code sections 11346, 11343 and 11342 together with Water Code section 1058, we conclude that the state policies for water quality control, which satisfy the definition of a "regulation" for purposes of the APA--and which are not otherwise exempt--must be adopted pursuant to the APA.

Moreover, the State Board has adopted water quality control policy pursuant to the APA.[24] Section 641 of Title 23 of the California Code of Regulations provides that "[t]he regulations contained in [chapter 3 of Title 23, which begins at section 640] are adopted for the purpose of implementing

and carrying out provisions of . . . , [the Porter-Cologne Act]." The reference notes[25] printed with State Board regulations in the California Code of Regulations also demonstrate that the State Board has adopted regulations pursuant to the APA to set state policy for water quality control under the Porter-Cologne Act. For example, Water Code sections 13140-13147, 13260 and 13263, all sections within the Porter-Cologne Act, are cited in the reference note for section 2510 of Title 23 of the CCR. Section 2510 concerns discharges of waste to land. The cited sections of the Porter-Cologne Act provide for the adoption of state policy for water quality control,[26] govern the filing of waste discharge reports with Regional Boards,[27] and provide for the regulation of waste discharges by Regional Boards.[28] State policy for water quality control has thus been adopted pursuant to the APA.

Further, the State Board's own regulations recognize that "regulations" adopted by the State Board are subject to the APA. Subdivision (a) of section 649 of Title 23 of the CCR provides:

> "(a) 'Rulemaking proceedings' shall include any hearings designed for the adoption, amendment, or repeal of any rule, regulation, or standard of general application, which implements, interprets or makes specific any statute enforced or administered by the State and Regional Boards." [Emphasis added.]

Section 649.1 of Title 23 provides:

> "Proceedings to adopt regulations, including notice thereof, shall, as a minimum requirement, comply with all applicable requirements established by the Legislature (Government Code Section 11340, et seq.) [the APA]. This section is not a limitation on additional notice requirements contained elsewhere in this chapter." [Emphasis added.]

We note that the Board concedes that Resolution 88-63 is a "regulation."[29] If this is the case, the above-quoted State Board regulations would appear to confirm that the regulatory provisions of Resolution 88-63 must be adopted pursuant to the APA.

General Background

To facilitate an understanding of the issues presented in this Request, we will discuss pertinent statutory, regulatory, and case law history, as well as the undisputed facts and circumstances that have given rise to the present Determination.

In 1986 by initiative measure, the voters of California enacted the Safe Drinking Water and Toxics Enforcement Act of 1986[30] (Proposition 65). One of the purposes of Proposition 65 is to protect the drinking water supply. With certain exemptions and exceptions, Proposition 65 prohibits the knowing discharge or release of a chemical known to cause cancer or reproductive toxicity "into water or onto or into land where such chemical passes or probably will pass into any source of drinking water, . . ."[31] (Emphasis added.) The phrase "source of drinking water" as used in Proposition 65 makes use of designations attached to bodies of water by Regional Boards in Water Quality Control Plans. The phrase is defined as follows by Health and Safety Code section 25249.11, subdivision (d):

> "'Source of drinking water' means either a present source of drinking water or water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses."

The identification or designation of waters as suitable for domestic or municipal uses is done by a Regional Board as a part of the process of adopting water quality control plans for its region. The Porter-Cologne Act, adopted in 1969, authorizes each Regional Board to identify or designate waters in its region that are suitable for domestic or municipal uses. Water quality control plans must be adopted by each Regional Board for all areas within its region[32] and must include such water quality objectives[33] as will in the judgement of the Regional Board "ensure the reasonable protection of beneficial uses and the prevention of nuisance; . . ."[34] Beneficial uses for which objectives may be established include domestic and municipal uses.[35]

Under the Porter-Cologne Act, the State Board has the responsibility to coordinate the state-wide program for water quality control[36] and to "formulate and adopt state policy for water quality control."[37] Apparently pursuant to this authority, the State Board adopted Resolution No. 88-63, "Sources of Drinking Water" on May 19, 1988. The resolution (which is reprinted in note 38) directs Regional Boards to identify all waters suitable for domestic or municipal uses and establishes criteria for making the designations.[38]

On July 15, 1988, the Blackwell Land Company, Inc. ("the Requester") filed a Request for Determination with OAL challenging Resolution No. 88-63. In its Request, the Requester alleges:

> "the Board has failed and refused to adopt Resolution 88-63 pursuant to the California APA. The

> Board has not, e.g., submitted the policy to OAL for Review and approval under the standards set forth in Government Code section 11349.1. Nor did the Board prepare and distribute an adequate initial statement of reasons upon proposing the policy, or a final statement of reasons upon adoption of the policy, as required by Government Code section 11346.7. Nor has the Board responded, in writing, to the many comments submitted on the proposed policy. Id."[39]

On February, 10, 1989, OAL published a summary of this Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.[40]

On request of the State Board, OAL granted the Board an extension of time in which to file its response. On May 2, 1989, the State Board filed an Agency Response to the Request with OAL.

II. DISPOSITIVE ISSUES

There are three main issues before us:[41]

(1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

(3) WHETHER THE LEGISLATURE HAS IMPLIEDLY EXEMPTED THE CHALLENGED RULES FROM THE APA.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . [Emphasis added.]"

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. . . . [Emphasis added.]"

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

Do the challenged rules establish standards of general application?

Resolution No. 88-63 clearly sets rules or standards of general application. The resolution provides that "[a]ll surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards . . . ." The resolution also establishes criteria to be used by the Regional Boards in excepting waters from this designation. These provisions and criteria apply to all designations to be made by all Regional Boards[42] concerning all waters of the state, with specified exceptions.[43] Thus, the provisions of the resolution are of general application.

Do the challenged rules implement, interpret or make specific the law enforced or administered by the agency?

The resolution also implements, interprets, and makes specific the law enforced or administered by the State Board and the Regional Boards. The resolution implements Health and Safety Code section 25249.11, subdivision (d) (quoted above)

by directing the Regional Boards to identify those waters potentially suitable for domestic or municipal uses in their Water Quality Control Plans. It makes subdivision (d) specific by providing:

> "'Sources of drinking water' shall be defined in Water Quality Control Plans as those water bodies with beneficial uses designated as suitable, or potentially suitable for municipal or domestic water supply (MUN); . . ."[44]

The resolution also makes the subdivision specific by providing: "All surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply . . . ."

Water Code section 13240 provides that "[e]ach regional board shall formulate and adopt water quality control plans for all areas within the region. . . ." The section also provides that "[s]uch plans shall be periodically reviewed and may be revised." Resolution 88-63 makes this section specific by requiring the Regional Boards to review existing Water Quality Control Plans and reconsider current designations assigned to any body of water to identify those water bodies presently or potentially suitable for municipal or domestic water supply. In this regard, Resolution 88-63 provides:

> "Any body of water which has a current specific designation previously assigned to it by a Regional Board in Water Quality Control Plans may retain that designation at the Regional Board's discretion. Where a body of water is not currently designated as MUN but, in the opinion of a Regional Board, is presently or potentially suitable for MUN, the Regional Board shall include MUN in the beneficial use designation."

Water Code section 13241 provides for the designation of beneficial uses. The section provides: "Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses . . . ." The section also provides:

> "Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:
>
> "(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of the water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) Economic considerations.

"(e) The need for developing housing within the region."

Resolution 88-63 makes Water Code section 13241 specific (1) by providing that all waters except waters which satisfy specified criteria are suitable, or potentially suitable for municipal or domestic water supply and should be so designated, and (2) by specifying the criteria for excepting waters from such designation.[45]

Water Code section 13140 provides that "[t]he state board shall formulate and adopt state policy for water quality control. . . ." In establishing the Porter-Cologne Water Quality Control Act the Legislature found in part that "the state-wide program for water quality control can be most effectively administered regionally, within a framework of state-wide coordination and policy."[46] Resolution 88-63 implements the intent of the Legislature as reflected in these provisions by establishing uniform criteria to be applied throughout the state by each Regional Board in designating waters as suitable or potentially suitable for municipal or domestic water supply.

Provisions in Resolution 88-63 thus implement, interpret and make specific Health and Safety Code section 25249.11, subdivision (d); and Water Code sections 13000, 13140, 13240 and 13241. We note, however, that several of the provisions in the resolution do not appear to implement, interpret or make specific the law enforced or administered by the State Board. Paragraphs 1 -- 4 of the "WHEREAS" part of the resolution merely restate existing law.[47] Paragraph 6 of the "WHEREAS" part of the resolution is a finding of fact.[48]

WE THEREFORE CONCLUDE that the provisions of State Water Resources Control Board Resolution No. 88-63, "Sources Of Drinking Water," except for "WHEREAS" provisions 1 through 4 and 6, are "regulations" as defined in Government Code section 11342, subdivision (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for

instance, "internal management"--are not subject to the procedural requirements of the APA.[49] However, none of the recognized exceptions apply to the provisions of Resolution 88-63.

THIRD, WE INQUIRE WHETHER THE LEGISLATURE HAS IMPLIEDLY EXEMPTED THE CHALLENGED RULES FROM APA REQUIREMENTS.

The State Board argues that the Porter-Cologne Act implicitly exempts Resolution 88-63 from the procedural requirements of the APA because the Porter-Cologne Act establishes a separate and distinct procedure for the adoption of water quality control policies.[50]

Exemptions from the APA must be express, not implied

As we explained in 1989 OAL Determination No. 4,[51] Government Code section 11346 provides that APA exemptions must be express and not implied. There we said:

> "In 1947, the Legislature enacted the following APA provision:
>
> > 'It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly.' [Emphasis added.]
>
> "In 1947, the above provision was numbered Government Code section 11420. Despite the dramatic rewriting of the APA in 1979 which led to the creation of OAL, this section was reenacted unaltered, except for renumbering as section 11346. Section 11346 thus represents a clear and strong legislative policy of 42 years standing, which was reaffirmed and underscored by the determined 1979 legislative effort to establish a central quality control authority to review state agency rules.
>
> "What did the Legislature mean by the word 'expressly' in section 11346?
>
> "According to settled principles of statutory interpretation, we are to look to the ordinary meaning of the

word. According the American Heritage Dictionary, 'expressly' means 'definitely and explicitly stated.' It also means 'in an express or definite manner; explicitly.' In a usage note under the word 'explicit,' the American Heritage Dictionary states:

> 'Explicit and express both apply to something that is CLEARLY STATED RATHER THAN IMPLIED. Explicit applies more particularly to that which is carefully spelled out: explicit instructions. Express applies particularly to a clear expression of intention or will: an express promise or an express prohibition.' [Underlined emphasis in original; capitalized emphasis added.]

"According to Black's Legal Dictionary, 'express' means:

> 'clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. . . . Made known distinctly and explicitly, and not left to inference. . . . The word is usually contrasted with "implied."' [Emphasis added.]

"When the Legislature wants to expressly exempt an agency from the APA, it knows what to say. For instance, Labor Code section 1185 expressly exempts rules concerning the minimum wage and similar matters:

> 'The orders of the [Industrial Welfare Commission (IWC)] fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the provisions of this chapter, shall be valid and operative and such orders are hereby expressly exempted from the provisions of Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.' [Emphasis added.]

"This statute explicitly and unmistakably exempts the listed rules. It is noteworthy, however, that the IWC has an elaborate public comment procedure that goes back to the World War I era, and is in some ways more stringent than the APA. Also, we note that the exemption is conditional--the Commission must follow the non-APA rulemaking procedures spelled out in the Labor Code. Further, we note that the exemption does not exempt the listed rules from the APA publication requirements. Thus, the researcher or member of the regulated public need not launch a multi-city search for the written rule. He or she need only turn to the appropriate CCR volume to locate the most current version of the rule. In fact, when work is completed later this year in

placing the CCR into a data base, subscribers will be able to gain instant access via computer to the text of regulations appearing in the CCR.

"Section 11346 also clarifies another important point. How do APA rulemaking requirements interact with statutes which prescribe different rulemaking procedures? Section 11346 answers this question comprehensively.

"First, section 11346 declares that the purpose of the APA is to 'establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations.' (Emphasis added.)

"Second, section 11346 declares that APA requirements are applicable to 'the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, . . .' (Emphasis added.)

"Third, [section] 11346 provides that nothing in the APA 'repeals or diminishes additional requirements imposed by any . . . statute [heretofore or hereafter enacted].' (Emphasis added.)"[52]

1989 OAL Determination No. 4 also contains an excellent discussion[53] of the structure of the APA and the legislative intent underlying the APA, which we have considered but will not reprint here.

In the application of these principles to this determination, OAL concludes (1) the APA does not repeal or diminish the "additional" procedural requirements spelled out in the Porter-Cologne Act; (2) subsequently enacted statutes--such as the Porter-Cologne Act--cannot "supersede" or "modify" APA provisions unless the subsequent legislation does so "expressly"; and (3) where both the APA and another statute impose limitations upon one particular agency's exercise of quasi-legislative power, and the other statute's limitations add to APA rules, both sets of limitations apply. Assume, for example, that the enabling act of agency X requires it to hold a public hearing prior to adopting regulations. According to the APA, a public hearing need not be scheduled unless a timely demand is received from the public. Section 11346 (and general principles of statutory interpretation) would indicate that agency X must comply with both APA procedures (e.g., summarize and respond to written public comments) and the specific mandate of its enabling act (i.e., hold a public hearing even if one is not specifically demanded by a member of the public).

The State Board concedes that the Porter-Cologne Act does not expressly exempt water quality control policies from the APA.[54] Consequently, Resolution 88-63 is not exempt from the APA.

The language of the Porter-Cologne Act does not establish an exemption from APA requirements

The State Board contends that the language of the Porter-Cologne Act shows that the Legislature intended to exempt not only Resolution 88-63, but all policies for water quality control from the requirements of the APA.[55] OAL cannot agree with this conclusion.

The State Board suggests that the "plain" and "clear" meaning of Water Code sections 13140 and 13141 is that the Legislature established a "separate" (non-APA) procedure in the Porter-Cologne Act for the adoption of water quality control policies, and that section 13147 somehow "defines" the process for adopting state policy for water quality control.[56]

However, no intent to limit the applicability of the APA is apparent in the language of those sections. Water Code section 13140 provides that state policy for water quality "shall be adopted in accordance with the provisions of this article. . . ." Water Code section 13141 provides that state policy "adopted or revised in accordance with the provisions of this article . . . shall become a part of the California Water Plan effective when such policies . . . have been reported to the Legislature at any session thereof." Water Code section 13147[57] simply requires a public hearing, advance notice to Regional Boards[58] and newspaper publication of the notice of the hearing as part of the process to be followed in the adoption of state water quality control policy. While none of these procedures are required by the APA, Government Code section 11346 (quoted above) clearly recognizes that additional requirements may be imposed by other statutes. The most that can be said of the language of these Water Code sections is that they make no mention of the APA. Nothing in the language used makes the procedures required by the Porter-Cologne Act exclusive. Consequently, OAL cannot agree that the language of the Porter-Cologne Act exempts Resolution 88-63 from the APA.

The Board's interpretation of the Porter-Cologne Act is beyond the scope of its authority

Government Code section 11346[59] (quoted above) subjects all quasi-legislative administrative rulemaking to the requirements of the APA. Notwithstanding the clear language of section 11346, the State Board argues that Resolution 88-63 is exempt from the APA because the Legislature reenacted a statute that the State Board and its predecessor, the State Water Quality Control Board, had interpreted as establishing an exemption from the APA for water quality control policy, and argues that the Legislature has not altered the interpretation by subsequent legislation.[60]

The State Board explains that the 1969 adoption of Water Code section 13147[61] constituted a reenactment of former Water Code section 13022.4, which had a settled administrative interpretation to the effect that water quality control policies are not subject to the APA. The Board cites to Industrial Welfare Commission v. Superior Court[62] for the proposition that "[r]eenactment of a statutory provision which has a settled administrative interpretation is persuasive that the intent was to continue the previous interpretation." The Board also cites to Coca-Cola v. State Board of Equalization[63] for the proposition that:

> "The State Board's long-standing interpretation of the Porter-Cologne Act has not been altered by subsequent legislation, even though the Porter-Cologne Act has been amended several times. Later statutes amending or referencing the Porter-Cologne Act provisions for adoption of water quality policies, without making any change that would require Administrative Procedure Act regulations, may be seen as legislative ratification of the administrative practices of the State and Regional Boards."

Assuming for this discussion that Water Code section 13022.4 did have the interpretation suggested by the State Board and that the interpretation was settled,[64] we must consider whether such an interpretation was within the scope of the authority of the State Board or its predecessor the State Water Quality Control Board. Administrative interpretations that alter or amend a statute or enlarge or impair its scope are void.[65] "[A]n erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change. [Citations; emphasis added.]"[66]

The resolution of this issue requires the application of principles of statutory construction. The powers of a state agency are drawn from California statutes or the Constitution.[67] While an agency may construe its enabling statutes or the statutes it is authorized to administer, such construction is constrained by the same rules of construction that apply to the courts. Principal rules of statutory construction were recently summarized by the California Supreme Court:

> "[The] first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual ordinary

> import and according significance, if possible to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.] A statute should be construed whenever possible so as to preserve its constitutionality. [Citations.]"[68]

Further, "[t]he contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, although not controlling, is entitled to great weight. [Citations.]"[69] Moreover, OAL, like the courts, must defer to an agency's construction of its own authority unless that interpretation is clearly erroneous.[70] Neither OAL nor a court may substitute its judgment for that of an agency's regarding the substantive content of an agency's interpretation of a statute it administers.[71] If, however, the meaning of a statute is clear, the statute is not subject to construction, even by the agency charged with its enforcement, unless otherwise provided by the Legislature.[72] An agency may not, through construction, alter or amend a statute, or enlarge or restrict its scope.[73] While a state agency may exercise delegated discretion, it has no discretion to exceed the authority conferred.[74] An administrative regulation that exceeds the scope of the authority granted to an agency is void.[75]

We apply these principles to the matter at hand. We look first to the words of Water Code section 13022.4. As added to the Dickey Water Pollution Act in 1965, Water Code section 13022.4[76] provided:

> "The state board shall not adopt water pollution or water quality control policy unless a public hearing is first held respecting the adoption of such policy. At least 60 days in advance of such hearing, the state board shall notify any affected regional board or boards. The affected regional board or boards shall submit written recommendations to the state

board at least 20 days in advance of the hearing."

The obvious purpose of this statute is to establish a procedure for the adoption of water pollution or water control policy by the state board that gives due regard for the authority of the regional boards.[77] Giving effect to the language in its usual, ordinary import and according significance to every word, phrase and sentence, we see nothing that even hints that the purpose of this law was to exempt the adoption of water quality control policies from the APA.

We next construe the words in context, keeping in mind the statutory purpose and harmonizing the words with the provisions of Government Code section 11346, a statute relating to the same subject. In doing so, we find that no conflict existed between the procedures in Water Code section 13022.4 or in any other provision in the Dickey Water Pollution Act, and the procedures required by the APA. Although the APA requires neither a public hearing nor notification of the Regional Boards, it clearly recognizes that other statutes may impose additional requirements.[78] The Agency Response identifies nothing in the legislative history or historical circumstances surrounding the enactment of Water Code section 13022.4 or any other provision in the Dickey Water Pollution Act that would lend support to the proposition that the Legislature intended by its enactment to exempt the adoption of water pollution or water quality control policy by the state board from the coverage of the APA. The only historical document that OAL is aware of which expressly addresses the question does not support the State Board's view.[79]

The interpretation urged by the State Board constitutes an amendment of Water Code section 13022.4 that would in effect permit the State Board to exceed limitations imposed by the APA on the exercise of quasi-legislative powers by the State Board. Neither the State Board nor any of its predecessors have been delegated the authority to amend a statute. The application of settled rules of statutory construction clearly shows that the interpretation urged by the State Board is wrong. Thus, it was not ratified by the Legislature by the adoption of the Porter-Cologne Act. Consequently, this argument cannot serve as a valid basis for exempting Resolution 88-63 from the requirements of the APA.

THE INTERPRETATION URGED BY THE BOARD DOES NOT MEET THE LEGAL STANDARD GENERALLY APPLIED TO REPEALS BY IMPLICATION

The statutory interpretation urged by the State Board would effect a partial repeal of Government Code section 11346. Repeals by implication are not favored. The general presumption against implied repeals was explained by the court in In Re Thierry S.[80] as follows:

> "When two or more statutes concern the same subject matter and are in irreconcilable conflict the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature, and thus to the extent of the conflict impliedly repeals the earlier enactment. Repeals by implication, however, are not favored and there is a presumption against operation of the doctrine. [Citation.] 'They are recognized only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation (brackets in original)], and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts [and administrative agencies] are bound, if possible, to maintain the integrity of both statutes if the two may stand together. [Citation.]"

The APA and the Porter-Cologne Act can be given concurrent effect and may "stand together" with regard to the procedures for the adoption of water quality control policies by the State Board. The State Board has identified no conflict between the Porter-Cologne Act and the APA in this regard and OAL sees none. This lack of conflict gives rise to the presumption that there was no implied repeal of the APA with regard to the adoption of state policy for water quality control by the State Board when the Legislature enacted the provisions of the Porter Cologne Act. Consequently, repeal by implication does not serve as a basis for exemption of Resolution 88-63 from the APA.

OTHER STATUTORY PROVISIONS

The State Board urges that other statutory provisions generally rely on the existence of water quality control policies. The statutory provisions cited by the State Board do not pertain to the water quality control policy at issue in this Determination i.e., the policy established by Resolution 88-63, "Sources of Drinking Water." We express no opinion in this Determination about any other policy adopted by the State Board.[81]

III. CONCLUSION

For the reasons set forth above, OAL finds that the provisions of Resolution No. 88-63, except for the "Whereas" provisions, (1) are "regulations" as defined in Government Code section 11342, subdivision (b); (2) are subject to the requirements of the APA; have not been adopted pursuant to the requirements of the APA; and (3) therefore, violate Government Code section 11347.5, subdivision (a).

DATE: May 17, 1989

for HERBERT F. BOLZ
Coordinating Attorney

for MICHAEL McNAMER
Senior Staff Counsel

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1 This Request for Determination was originally filed by Roger Lane Carrick, Esq., Heller, Ehrman, White & McAuliffe, 333 Bush Street, San Francisco, CA 94104-2878, (213) 689-0200, on behalf of the Blackwell Land Company, Inc. The Blackwell Land Company is now represented by George H. Soares, of Kahn, Soares & Conway, 1121 I Street, Suite 200, Sacramento, CA 95814, (916) 448-3826. The State Water Resources Control Board was represented by Steven H. Blum, Staff Counsel, Legal Office, State Water Resources Control Board, P. O. Box 100, Sacramento, CA 95801-0100, (916) 322-0188.

To facilitate indexing and compilation of determinations, OAL began as of January 1, 1989 assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "266" rather than "1."

2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

> Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's licensee auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens --California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcohol Beverage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to follow APA in adopting policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals because it necessarily led to improper conduct), vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple opinions of interest as early efforts to

grapple with underground regulation issue in license revocation context); California Association of Health Facilities v. Kizer (1986) 178 Cal.App.3d 1109, 224 Cal.Rptr. 247 (court issued mandate requiring Department of Health Services to comply with statute which directed the Department to establish a subacute care program in health facilities and to promulgate regulations to implement the program); Carden v. Board of Registration for Professional Engineers (1985) 174 Cal.App.3d 736, 220 Cal.Rptr. 416 (admission of uncodified guidelines in licensing hearing did not prejudice applicant); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed --a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Newland v. Kizer (Cal.App. 4 Dist. 1989) 89 Daily Journal D.A.R 4932 (mandate is proper remedy to require the Department of Health Services to adopt regulations regarding temporary operation of long-term health care facilities as directed by statute); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit $38,000 purse involved application of a rule to a specific set of existing facts, rather than "surreptitious rulemaking"); Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of

Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

> (1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or
>
> (2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services submitted to OAL (OAL file number 88-1208-02) in December 1988, Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept process, procedures and instructions contained in administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 49, infra).

See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

> Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations's State Conciliation Service rules relating to certification of labor organizations and bargaining units); and Part-time Faculty as

Members of Community College Academic Senates, 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (policy of permitting part-time faculty to serve in academic senate despite regulation limiting service to full-teachers). Cf. Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces subject to jurisdiction of California Adjutant General fall within "internal management" exception); and Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two statutes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions).

3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subdivision (a) provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule

which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great

weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

In the matter at hand, comments were submitted to OAL by the Environmental Defense Fund, the Health and Welfare Agency, the Honorable Byron D. Sher member of the California Assembly, and by the original Requester, the Blackwell Land Company. On May 2, 1989, the Board submitted a Response to the Request for Regulatory Determination under Government Code section 11347.5. OAL considered all of these materials in making this determination.

7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL for the purchase price of $3.00.

10 Water Code section 13001.

11 "'Waters of the state' means any water, surface or underground, including saline waters within the boundaries of the state." Water Code section 13050, subdivision (e).

12 Water Code sections 13000, 13140.

13 See Water Code section 13000.

14 Water Code section 13200.

15 Water Code section 13100, Government Code section 12805.

16 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does <u>not</u>

review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

17 1989 OAL Determination No. 4 (State Water Resources Control Board and San Francisco Regional Water Quality Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1026.

18 The State Board also succeeds to rulemaking powers previously delegated to certain other entities. Water Code section 179 provides:

> "The board succeeds to and is vested with all of the powers, duties, purposes, responsibilities, and jurisdiction vested in the Department and Director of Public Works, the Division of Water Resources of the Department of Public Works, the State Engineer, the State Water Quality Control Board, or any officer or employee thereof, under Division 2 (commencing with Section 1000), except Part 4 (commencing with Section 4000) and Part 6 (commencing with Section 5900) thereof; and Division 7 (commencing with Section 13000) of this code, or any other law under which permits or licenses to appropriate water are issued, denied, or revoked or under which the functions of <u>water pollution and quality</u> control are exercised." [Emphasis added.]

19 Water Code section 174.

20 Kerr's Catering Service v. Department of Industrial Relations (1962) 57 Cal.2d 319, 330, 19 Cal.Rptr. 492, 498; City of San Marcos v. California Com'n, Dept. of Transp. (1976) 60 Cal.App.3d 383, 405, 131 Cal.Rptr. 804, 818.

21 The section goes on to list exceptions to the filing requirement, none of which are applicable here.

22 Government Code section 11342, subdivision (a).

23 As part of the major revision of statutes governing water quality control enacted as the Porter-Cologne Water Quality Control Act, Water Code section 1058 was amended to authorize the adoption of regulations to carry out the State Board's powers and duties "under this code." It previously read "under this division." This change was recommended in a report entitled, "Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program (1969)." In the report, the proposed amendment was followed by a note which provides:

> "Amendment would authorize state board to issue regulations with respect to water quality under the provisions of [the Porter-Cologne Water Quality Control Act.] [Emphasis added.]"

The report is to be given substantial weight in interpreting the Porter-Cologne Act. People v. Berry (1987) 194 Cal.App.3d 158, 173-174, 239 Cal.Rptr. 349, 359.

24 The adoption of regulations to set state-wide policy on water quality control is consistent with legislative views on the adoption of state-wide policy for control of water pollution under the Dickey Water Pollution Act of 1949 (Stats. 1949, c. 1549), the forerunner of the Porter-Cologne Act. Those views are evidenced by this excerpt from the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature (p. 59):

> "The State Water Pollution Control Board is an independent agency of government which is closely aligned to the Division of Water Resources and is charged with the formulation of a state-wide policy for the control of

water pollution, the administration of a state-wide program of financial assistance for water pollution control, and administering a state-wide program of research into technical phases of water pollution control. . . .

"The board is specifically authorized to adopt rules and regulations for the administration of the Water Pollution Control laws, but such authority does not specify the procedure to be followed in the adoption of regulations or establishing state-wide policy, nor is it limited in all cases to regulations which are reasonably necessary.

". . . .

"The board does not believe its functions are of a type which makes it necessary to adopt any large quantity of rules or regulations, but the board does try to coordinate the policies of the nine regional control boards by a Preliminary Statement of Objective and Policy, which the board believes to be only advisory in nature.

"The committee recommends the following, relating to the authority of the board to adopt regulations:

". . . .

". . . .

"3. The formulation of a state-wide policy should be required to be accomplished by way of regulation to permit public participation in the processes." [Emphasis added.]

When this report was issued, Water Code section 13020 authorized the State Water Pollution Control Board to adopt regulations and Water Code section 13022 provided:

"The state board shall formulate a state-wide policy for control of water pollution with due regard for the authority of the regional boards."

We note that the court in Armistead v. State Personnel Board. ((1978) 22 Cal.3d 198, 202 and 205, 149 Cal.Rptr. 1, 2 and 4) relied heavily on the 1955 report to the Legislature as an indicator of legislative intent with regard to the adoption of regulations by the State Personnel Board. We further note that the the State Personnel Board's enabling legislation did

not expressly require the adoption of all of its regulations pursuant to the APA, a situation parallel to the instant one.

25 A regulation transmitted to OAL for filing with the Secretary of State must be accompanied by a notation, prepared by the adopting agency, citing to the specific statute or other provision being implemented, interpreted or made specific by the regulation. Government Code section 11343.1, subdivision (b).

26 Water Code sections 13140-13147.

27 Water Code section 13260.

28 Water Code section 13263.

29 Agency Response, p. 2.

30 Health and Safety Code sections 25249.5 through 25249.13.

31 Health and Safety Code section 25249.5.

32 Water Code section 13240.

33 "'Water quality objectives' means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." Water Code section 13050, subdivision (h).

34 Water Code section 13241.

35 "'Beneficial uses' of the waters of the state that may be protected against quality degradation include, but are not necessarily limited to, domestic, municipal, agricultural and industrial supply; . . ." Water Code section 13050, subdivision (f).

36 See Water Code section 13000.

37 Water Code section 13140.

38 Resolution 88-63 provides in its entirety:

"WHEREAS:

"1. California Water Code Section 13140 provides that the State Board shall formulate and adopt State Policy for Water Quality Control; and,

"2. California Water Code Section 13240 provides that Water Quality Control Plans 'shall conform' to any State Policy for Water Quality Control; and,

"3. The Regional Boards can conform the Water Quality Control Plans to this policy by amending the plans to incorporate the policy; and,

"4. The State Board must approve any conforming amendments pursuant to Water Code Section 13245; and,

"5. 'Sources of drinking water' shall be defined in Water Quality Control Plans as those water bodies with beneficial uses designated as suitable, or potentially suitable, for municipal or domestic water supply (MUN); and,

"6. The Water Quality Control Plans do not provide sufficient detail in the description of water bodies designated MUN to judge clearly what is, or is not, a source of drinking water for various purposes.

"THEREFORE BE IT RESOLVED:

"All surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards [footnote omitted] with the exception of:

"1. Surface and ground waters where:

"a. The total dissolved solids (TDS) exceed 3,000 mg/L (5,000 uS/cm, electrical conductivity) and it is not reasonably expected by Regional Board to supply a public water system, or

"b. There is contamination, either by natural processes or by human activity (unrelated to a specific pollution incident), that cannot reasonably be treated for domestic use using either Best Manage-

ment Practices or best economically achievable treatment practices, or

"c. The water sources does not provide sufficient water to supply a single well capable of producing an average, sustained yield of 200 gallons per day.

"2. Surface waters where:

"a. The water is in systems designed or modified to collect or treat municipal or industrial wastewaters, process waters, mining wastewaters, or storm water runoff, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards; or,

"b. The water is in systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Board.

"3. Ground water where:

"The aquifer is regulated as a geothermal energy producing source or has been exempted administratively pursuant to 40 Code of Federal Regulations, Section 146.4 for the purpose of underground injection of fluids associated with the production of hydrocarbon or geothermal energy, provided that these fluids do not constitute a hazardous waste under 40 CFR, Section 261.3.

"4. Regional Board Authority to Amend Use Designations:

"Any body of water which has a current specific designation previously assigned to it by a Regional Board in Water Quality Control Plans may retain that designation at the Regional Board's discretion. Where a body of water is not currently designated as MUN but, in the opinion of a Regional Board, is presently or potentially suitable for MUN, the Regional Board shall include MUN in the beneficial use designation.

"The Regional Boards shall also assure that the beneficial uses of municipal and domestic supply are designated for protection wherever those uses are presently being attained, and assure that any changes in beneficial use designations for waters of the State are consistent with all applicable regulations adopted by the Environmental Protection Agency.

"The Regional Boards shall review and revise the Water Quality Control Plans to incorporate this policy."

39 Request for Determination, pp. 3-4.

40 Register 89, No. 6-Z, p. 271A

41 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

42 Apparently, more discretion is allowed the Regional Boards with regard to waters that already have a specific designation assigned to them. In this regard, the resolution provides:

"Any body of water which has a current specific designation previously assigned to it by a Regional Board in Water Quality Control Plans may retain that designation at the Regional Board's discretion."

43 The resolution expressly provides that it "does not affect any determination of what is a potential source of drinking water for the limited purposes of maintaining a surface impoundment after June 30, 1988, pursuant to Section 25208.4 of the Health and Safety Code."

44 See also paragraph 5 of the "WHEREAS" part of the resolution which provides:

"'Sources of drinking water' shall be defined in Water Quality Control Plans as those water bodies with beneficial uses designated as suitable, or potentially suitable, for municipal or domestic water supply (MUN); . . ."

45 The resolution establishes the following criteria for excepting waters from designation as suitable, or potentially suitable for municipal or domestic water supply:

"1. Surface and ground waters where:

"a. The total dissolved solids (TDS) exceed 3,000 mg/L (5,000 uS/cm, electrical conductivity) and it is not reasonably expected by Regional Boards to supply a public water system, or

"b. There is contamination, either by natural processes or by human activity (unrelated to a specific pollution incident), that cannot reasonably be treated for domestic use using either Best Management Practices or best economically achievable treatment practices, or

"c. The water sources does not provide sufficient water to supply a single well capable of producing an average, sustained yield of 200 gallons per day.

"2. Surface waters where:

"a. The water is in systems designed or modified to collect or treat municipal or industrial wastewaters, process waters, mining wastewaters, or storm water runoff, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards; or,

"b. The water is in systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Board.

"3. Ground water where:

"The aquifer is regulated as a geothermal energy producing source or has been exempted administratively pursuant to 40 Code of Federal Regulations, Section 146.4 for the purpose of underground injection of fluids associated with the production of hydrocarbon or geothermal energy, provided that these fluids do not constitute a hazardous waste under 40 CFR, Section 261.3."

46 Water Code section 13000.

47 "WHEREAS:

"1. California Water Code Section 13140 provides that the State Board shall formulate and adopt State Policy for Water Quality Control; and,

"2. California Water Code Section 13240 provides that Water Quality Control Plans 'shall conform' to any State Policy for Water Quality Control; and,

"3. The Regional Boards can conform the Water Quality Control Plans to this policy by amending the plans to incorporate the policy; and,

"4. The State Board must approve any conforming amendments pursuant to Water Code Section 13245; . . ."

48 Paragraph 6 of the resolution provides:

"The Water Quality Control Plans do not provide sufficient detail in the description of water bodies designated MUN to judge clearly what is, or is not, a source of drinking water for various purposes."

49 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

50 In contrast to the State Board's position, we note that the State Board is directed by Water Code section 13370, subdivision (c) to implement the provisions of the federal Clean Water Act, and further note that the federal regulation setting out minimum requirements for participation by states in the activities under the Clean Water Act (40 C.F.R 25.10, subd. (b) [7-1-88 Edition]) generally recognizes that rulemaking by a state under the Clean Water Act is bound by the state's own administrative procedure act. The regulation expressly provides:

"in the event of a conflict between [minimum federal procedures for state rulemaking under the Clean Water Act] and a provision of a State's administrative procedures act, the State's law shall apply."

Thus, no support for the State Board's position may be drawn from its duty to implement the Clean Water Act.

51 See note 17, supra.

52 Id., pp. 126-128.

53 See pp. 120-126.

54 Agency Response, p. 5.

55 In this determination, OAL considers only whether the provisions of Resolution 88-63 are subject to the requirements of the APA.

56 Although the unarticulated premise of this argument appears to be that the Porter-Cologne Act establishes an exclusive process for the adoption of state policy for water quality control, that does not appear to be the State Board's position. If it were, then logically the Board would also be exempt from other general procedural requirements such as the provisions of the Bagley-Keene Open Meeting Act (Gov. Code secs. 11120 through 11132), which govern the conduct of meetings by state bodies. The State Board, however, recognizes that it is covered by the Bagley-Keene Open Meeting Act. See California Code of Regulations, Title 23, sections 647 through 647.5.

57 Water Code section 13147 provides in its entirety:

"The state board shall not adopt state policy for water quality control unless a public hearing is first held respecting the adoption of such policy. At least 60 days in advance of such hearing the state board shall notify any affected regional boards, unless notice is waived by such boards, and shall give notice of such hearing by publication within the affected region pursuant to Section 6061 of the Government Code. The regional boards

shall submit written recommendations to the state board at least 20 days in advance of the hearing. [Stats. 1971, ch. 1288, sec. 3.]"

58 The requirement to give notice to an affected regional board may be waived by that regional board.

59 Government Code section 11346, added by Stats. 1979, ch. 567, is derived from former section 11420, added by Stats. 1947, ch. 1425.

60 "Legislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute." 2A Sutherland on Statutory Construction (4th ed.) 49.10, p. 407. It is particularly weak here. The State Board suggests that the amendment of the Porter-Cologne Act without making any change that would require the adoption of state water quality control policies pursuant to the APA may be seen as legislative ratification of the State Board's interpretation. Such amendment, however, has been and continues to be wholly unnecessary in light of the clear beacon of Government Code section 11346.

61 The full text of section 13147 is set out in footnote 57.

62 (1980) 27 Cal.3d 690, 708-09, 166 Cal.Rptr 331, 341, app. dismissed, cert. denied, 449 U.S. 1029, 1034, 101 S.Ct. 602, 610.

63 (1945) 25 Cal.2d 918, 922. Accord, Mission Pak. Co. v. State Board of Equalization, (1972) 23 Cal.App.3d 120, 125-126, 100 Cal.Rptr. 69, 72.

64 It is not clear from the information provided in the Agency Response that a settled administrative interpretation regarding non-APA adoption of state policy under the Dickey Water Pollution Act existed in 1969. The State Board asserts that the 1969 interpretation is based upon Resolution No. 66-17, "Approving Procedures for Formulating Water Quality Control Policy," which, according to the State Board, "did not provide for Administrative Procedure Act rulemaking." OAL has not been provided with a copy of the Resolution and it is not clear from the Agency Response whether the resolution even applies to the adoption of statewide policies by the State Water Quality Control Board. The discussion of the resolution in the Agency Response focuses on the adoption of poli-

cies by the Regional Boards. It is also unclear from the Agency Response whether the resolution expressly addresses the non-application of the APA to state-wide policies. These ambiguities are compounded by the fact that from July 14, 1960 (Cal. Admin. Code Supp., Register 60, No. 14 (June 25, 1960) Title 23, p. 78.14), until July 29, 1971 (Cal. Admin. Code Supp., Register 71, No. 27 (July 3, 1971) Title 23, p. 78.9), state-wide policy for control of water pollution was codified in the form of regulations in the California Administrative Code. Thus, from the information available to OAL in making this determination, it is debatable whether a settled administrative interpretation on the applicability of the APA to state policy on water quality control existed in 1969.

65 Dyna-Med v. Fair Employment & Housing (1987) 43 Cal.3d 1379, 1389, 241 Cal.Rptr. 67, 71 (interpretation that Fair Employment and Housing Commission may impose punitive damages found to be unauthorized).

66 Whitcomb Hotel, Inc. v. California Employment Com. (1944) 24 Cal.2d 753, 757-758.

67 Ferdig v. State Personnel Bd. (1969) 71 Cal.2d 96, 103-104, 77 Cal.Rptr. 224, 228-229.

68 Dyna-Med v. Fair Employment & Housing, supra, note 65, 43 Cal.3d 1379, 1386-1387, 241 Cal.Rptr. 67, 69-70.

69 Id., at p. 1388.

70 See Cal. Drive-In Restaurant Assn. v. Clark (1943) 22 Cal.2d 287, 294.

71 Government Code section 11340.1.

72 Tiernan v. Trustees of Cal. State University (1983) 33 Cal.3d 211, 218-219, 188 Cal.Rptr. 115, 119-120.

73 Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 390-91, 211 Cal.Rptr. 758, 760-761.

74 California Welfare Rights Organization v. Brian (1974) 11 Cal.3d 237, 242, 113 Cal.Rptr. 154, 157.

75 Morris v. Williams (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 699.

76 Statutes 1965, chapter 1657.

77 As originally adopted, section 13022 of the Dickey Water Pollution Act directed the state board to "formulate a statewide policy for control of water pollution with due regard for the authority of the regional boards." (Emphasis added.)

78 Government Code section 11346.

79 See note 24, supra, for excerpt from the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature of the State of California.

80 (1977) 19 Cal.3d 727, 744, 139 Cal.Rptr. 708, 717.

81 The Agency Response from the State Board and comments from the Health and Welfare Agency and Assembly Member Byron Sher urge that the adoption by the Legislature of Health and Safety Code section 25297.1 ratified the State Board's interpretation that the Porter-Cologne Act establishes an independent procedure for adopting policies for water quality control, which is exempt from the requirements of the APA. This argument is based upon the following circumstances surrounding the adoption of AB 853 of the 1987-88 Regular Session of the California Legislature. AB 853 proposed the development and implementation of a pilot program for abatement of releases of hazardous substances from underground storage tanks. When AB 853 was introduced, subdivision (d) of section 25297.1 provided that the State Board "shall adopt administrative and technical procedures for cleanup and abatement actions taken pursuant to this section. . . ." And, subdivision (b) provided that cleanup and abatement actions "shall be consistent with procedures and regulations adopted by the board pursuant to subdivision (d) . . . ." On June 1, 1987, subdivision (d) was amended to provide that the State Board shall adopt the administrative and technical procedures "as part of the state policy for water quality control adopted pursuant to Section 13140 of the Water Code, . . ." On September 4, 1987, subdivision (b) was amended to

delete the word "regulation," so that as chaptered, subdivision (b) provides that the cleanup and abatement actions "shall be consistent with procedures adopted by the board pursuant to subdivision (d).

Health and Safety Code section 25197.1 did not amend the Porter-Cologne Act procedures for the adoption of all state water quality control policies. It only subjects procedures for cleanup and abatement actions developed under Health and Safety Code section 25297.1, to adoption pursuant to the Porter-Cologne Act procedures. Consequently, its legislative history is of limited value in establishing a blanket APA exemption for all water quality control policies. The legislative history and language of the Porter-Cologne Act itself is of far greater significance. The procedures for cleanup and abatement actions under Health and Safety Code section 25297.1 are not the subject of this determination. A number of inferences could be drawn from the amendment of subdivision (d). As an example, the inclusion of the word "regulation" could have been seen as unnecessary because of the clear provisions of Government Code section 11346. However, because the procedures for cleanup and abatement actions are not the subject of this determination and because OAL is without the benefit of public comment and a complete record on the questions concerning the procedures to be adopted pursuant to section 25297.1, we express no opinion about them here.

82 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris and Senior Legal Typist Tande' Montez in the processing and preparation of this Determination.